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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1331.

REVELLE W. BROWN, et. al., TRUSTEES OF THE ESTATE OF STEPHEN GIRARD,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, et. al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

COUNTERSTATEMENT OF QUESTION PRESENTED.

The District Court, after a full evidentiary hearing, found that beginning in 1831 and continuing to date the Commonwealth of Pennsylvania and the City of Philadelphia by the enactment of statutes and ordinances, by the special supervision of public officials (appointed by legislative and judicial bodies), by the rendering of services, and by the providing of tax exemption and perpetual existence, have given aid, assistance and direction to the construction, maintenance, operation and policies of Girard College, including its racial policies, and that the present

sui generis trustees of Girard College were appointed *sua sponte* by the Orphans' Court of Philadelphia solely in order to permit continued exclusion of Negroes. The record basis for these fact findings has not been contravened. Therefore the question presented is:

Did the Court of Appeals properly affirm the District Court's legal conclusion, based on these facts, that the trustees' continued refusal to admit qualified Negro children violated the equal protection clause of the Fourteenth Amendment?

COUNTERSTATEMENT OF THE CASE.

Petitioners' statement sets forth the procedural history of this litigation. Respondents do not agree with the gloss Petitioners have put on various procedural events and decisions, but it is not necessary to burden the Court with a restatement thereof. This Counterstatement of the Case therefore will be confined to the additional factual background necessary to an understanding of the legal question presented.[1]

Petitioners here denied admission to Girard College to qualified Negro boys solely on the basis of their race. The District Court, after three days of hearing the evidence, found as a fact:

> "Beginning in 1831 and continuing to date, the Commonwealth of Pennsylvania and the City of Philadelphia, by the enactment of statutes and ordinances, by the use and supervision of public officials, appointed by legislative and judicial bodies, by rendering services and providing tax exemptions, perpetual existence and exemption from tort liability, have given aid, assistance, direction and involvement to the construction, maintenance, operation and policies of Girard College" (808a, 869a, A52[2]).

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1. Respondents do not believe that the Petition conforms with this Court's Rule 23(1)(e) which calls for "a concise statement of the case *containing the facts material to the consideration of the questions presented.*" The Petition has wholly omitted the factual evidence which was the basis of the decisions of both courts below. This is a sufficient ground in and of itself for denying the writ. See Supreme Court Rule 23(4).

2. Page references proceeded by a large "A" are to the Appendix to the Petition for Writ of Certiorari. Those followed by a small "a" are to the separately bound two volume appendix. Those followed by a small "b" are to the short appendix attached to this brief (which contains relevant record documents omitted from the bound appendix).

Petitioners did not contend in the Court of Appeals and do not contend here, as they could not, that this finding is not supported by the evidence. The Court of Appeals held that there is "full justification in the record" for such factual finding (A57). In fact, as set out below, the evidence is overwhelming.

In 1831 Girard, reciting that he had "sincerely at heart the welfare of the City of Philadelphia," gave "the residue and remainder" of his estate[3] to "The Mayor, Aldermen and Citizens of Philadelphia their successors and assigns in trust" for various municipal and charitable purposes including the planning, construction and operation of Girard College by the City of Philadelphia (44a). Clearly, the gift to the City was made with an intention other than the acquisition of a perpetual trustee.[4] Clause XXI 9 of his Will states:

> "In relation to the organization of the college and its appendages, I leave, necessarily, *many details to the Mayor, Aldermen and citizens of Philadelphia and their successors;* and I do so, with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow citizens of Philadelphia, will observe and evince especial care and anxiety in selecting members for their City Councils, and other agents . . ." (55a).[5]

Girard's contemporaries fully recognized that: "The whole value of the institution [Girard College] will depend en-

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3. Girard made some incidental private bequests and charged the City of Philadelphia with the duty of administering some of them. See, *e.g.*, Clause XVIII (40a).

4. Assuming there was no other institution then available to be a perpetual trustee, that fact in itself is a state-conferred benefit. However, Girard obviously could have appointed a group of private citizens with the right of the survivors to fill vacancies.

5. Italics in all quotations herein have been added.

tirely upon the administration of it," and that the College was to be a *public* charity run by public officials, and subject to constant public and legislative scrutiny[6] (809a, 869a, P-37, P-44). The following provision of the Will puts this fact beyond dispute:

> "Second, that separate accounts, distinct from the other accounts of the corporation, shall be kept by the said corporation, concerning the said devise, bequest, college and funds, and of the investment and application thereof; and that a separate account or accounts of the same shall be kept in bank, not blended with any other account, so that it may at all times appear on examination by a committee of the legislature as hereinafter mentioned, that my intentions had been fully complied with:—Third, that the said corporation render a detailed account annually in duplicate to the legislature of the Commonwealth of Pennsylvania, at the commencement of the session, one copy for the senate and the other for the house of representatives, concerning the said devised and bequeathed estate, and the investment and application of the same, and also a report in like manner of the state of the said College, and shall submit all their books papers and accounts touching the same, to a committee or committees of the legislature for examination, when the same shall be required: Fourth, the said corporation shall also cause to be published in the month of January, annually, in two or more newspapers printed in the city of Philadelphia, a concise but plain account of the state of the trusts, devises, and bequests herein declared and made,

6. In 1950 Girard's Solicitor, in a letter approved by the then-trustees, said: "Girard College is owned, administered, operated and maintained by the City of Philadelphia, acting through a municipal department, to wit, the Board of Directors of City Trusts" (D-7, 11b).

> comprehending the condition of the said college, the number of scholars, and other particulars needful to be publicly known, for the year next preceeding the said month of January, annually" (63a-64a).

Each year reports are submitted to the Legislature and published in the newspapers.

In 1832 the City passed a special resolution accepting the Girard gifts, including the provisions for the College, and later in the year passed an Ordinance creating a plan for selection by the City Councils of a Board to run Girard College as agents of the City Councils (809a, 869a).

The Estate of Stephen Girard turned over to the City by his executors amounted to only six million dollars (810a, 869a). The principal increased under the management of the City of Philadelphia, to an amount in excess of ninety million dollars by 1959, even with the College buildings and grounds and other real estate owned by Girard at his death carried on the books of the Estate at no value. The insurable value of the Estate's physical properties today is $63,000,000, including $42,000,000 applicable to the College (P-69, 10b). The private executors took their usual fees and commissions; the City, however, never received compensation for any of its services.

Before the College had actually been built by the City, excess income from the Estate was used by the City, as the Will directed, for general municipal purposes including payment for police.[7] To this day if there is an excess of income from trust properties over the needs of the College, such excess goes to the City. The present trustees themselves consider this provision, giving money to the City of Phila-

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7. Girard provided in Clause XXIV 3 that the City should be the remainderman under his Will with contingent remainders to the State and the Federal government "for the purposes of internal navigation" (63a).

delphia for other municipal purposes, highly significant to show public involvement. When they sought to induce the Federal government to grant the College a tax exemption, the application submitted stated:

> "It is interesting to note that in the event the Orphans' Court should determine at a future date that the needs of Girard College are amply protected by adequate income reserves, excess income will be distributed to the City of Philadelphia in accordance with Mr. Girard's directions." (734a)

Thus the City's decisions on timing in building and opening the College, its decisions as to the lavishness and completeness of the College, the size of the student body, the salary scale of the teachers and staff, as to how much should be spent for maintenance over the years and what reserves, if any, should be created, all had the effect of depriving the City of revenues to which it would otherwise have been entitled for other general municipal use.

In March, 1833, the City Councils appointed a building committee for the College consisting of members of Council. The Council also advertised for plans and offered prizes for the design of the College buildings. By another 1833 Ordinance the Council authorized appointment of a College president and appropriated six thousand dollars for his expenses on a trip to study similar institutions in Europe (71a, 73a, 810a-11a, 869a).

On July 4, 1833, the cornerstone of the main college building was laid at a ceremony presided over by the Mayor, Aldermen and Councilmen of the City (811a, 869a). At this ceremony a scroll containing the names of the City officials was deposited in the cornerstone where it remains to this day (*ibid.*). Following this ceremony the City planned, caused to be undertaken and supervised the physical con-

struction of all of the buildings as well as the wall at Girard College. Since the 43 acres left by Girard had been vacant farm land, every stone at Girard College was placed upon another stone by the City of Philadelphia (*ibid.*).

Every expenditure for the Girard Estate and for Girard College between 1832 and 1869 was specifically approved by a special ordinance of the City Councils (811a, 869a). In fact, the records of City Councils reveal that over the years some 320 special ordinances have been enacted providing for the operation, management, supervision and policy of Girard College (70a-102a). Among the various subjects covered by these numerous ordinances were ones permitting the admission of new students, determining the size of the student body and which buildings should be built, appropriating funds for litigation and reorganizing from time to time the specific body of directors responsible for administering the College. In addition the City Councils provided for a visiting committee of its own members to undertake supervision (812a-17a, 869a).

The City ultimately completed construction of the College buildings in 1847 and the College opened on January 1, 1848. The President of the Board of Directors of the College indicated at that time that the Board undertook its task with the Will of the founder as a guide, assisted by laws of the State and ordinances of the City Councils (813a, 869a). Indeed, throughout this period the City Councils exercised minute control over the affairs of the College, particularly in connection with the construction of the buildings. And after 1851, the City Councils abolished the trustees of the College and again placed supervision of all payments under the Councils themselves.

At the same time, the City improved Girard's real estate at 12th and Market Streets in Philadelphia, building such revenue-producing stores as Snellenburg's Department

Store, which for many years yielded income for use at the College (736a, 816a, 869a).[8]

After 1869, the Board of Directors of City Trusts operated the College. The members were "agents or officers of said City" (635a). They selected the president and the faculty, determined the curriculum and the size of the student body, decided whether buildings were to be built or torn down, and managed the investments (635a-638a).

State tax exemption now excuses the College from paying $401,184 per year (106a, 823a, 869a), and Federal tax exemption (in 1963) $2,640,000 per year (108a, 823a, 869a).

Beginning in 1848, and throughout its entire operation of the College, the City of Philadelphia itself excluded from Girard College applicants whom it deemed not to be white.

While the City of Philadelphia took the most direct and active part in building and operating the College, the Commonwealth also played an essential role. For example, it enacted certain enabling legislation contemplated by Girard's Will and made necessary because certain provisions of the Will called for actions of questionable legal validity or could not be achieved without specific legislation. *Girard Will Case,* 386 Pa. 548, 554, 127 A. 2d 287, 289-90 (1956).

These various Acts, collected in Exhibit P-51, include ones authorizing the City of Philadelphia to act under Girard's Will,[9] authorizing guardianship[10] and indenturing

8. When Snellenburg's recently (1963) unilaterally cancelled its lease with the Girard Estate, the Estate suffered an annual loss of some $360,000 on the Market Street property (817a). This was repaired only when the Philadelphia Community College, a governmental body, leased the "white elephant" department store building, turning the Estate's loss into an annual profit of $304,271 (1b-2b, 817a, 869a).

9. Act of March 24, 1832, P. L. 176, Act of April 4, 1832, P. L. 275.

10. Act of February 27, 1847, P. L. 178, Act of April 20, 1853 § 6, P. L. 623; Act of May 23, 1887, P. L. 168. When the City was removed as trustee, the Legislature accommodated the Estate so that the present Trustees could serve as guardian of the estates of Girard minors. Act of Nov. 19, 1959, P. L. 1526. See p. 14 *infra*.

of boys under the Will [11] and providing that the City should not place a road or street through the College grounds [12] (See 817a-19a, 869a).[13] The Legislature established a select committee of the House on the Estate of Stephen Girard and received annual reports from the trustees of the College. At various times these reports were printed as appendices to the Legislative Journals (819a, 869a).

In 1842 a special committee of the House of Representatives investigated the state of the College and issued extensive reports. In 1852, the Legislature directed the State Secretary to furnish a full set of the Colonial Records to the College which it retains.[14] When public outcry caused the Legislature to investigate the College's operation under City Council, the Legislature in 1869 enacted a statute establishing a special agency of the City, the Board of Directors of City Trusts, to administer the College [15] (820a, 869a).

As both school and orphanage the College serves a public function and has traditionally solicited its students from the white public at large, with State schools cooperating by recommending eligible white students (868a-69a).

The foregoing history touches only the highlights of the active participation of City and State in the creation and perpetuation of Girard College. A fuller presentation of this history is set forth in plaintiffs' Request for Findings of Fact in the District Court (807a-23a). These proposed findings were largely granted by the District Court (869a) and the Court of Appeals held that his findings had

11. Act of Feb. 27, 1847, P. L. 178.

12. Act of March 24, 1832 § 11, P. L. 182; Act of May 3, 1832 § 18, P. L. 428; Act of March 14, 1846 § 1, P. L. 125.

13. Thus the supposed "private" appearance of the College, stressed at p. 7 of the trustees' Petition, is the product of State action.

14. Act of April 2, 1852 § 4, P. L. 237.

15. Act of June 30, 1869, P. L. 1276.

"full justification in the record" (A57). Petitioners do not contest this. In sum these facts demonstrate the essential point of this case: that *but for* the activities of the State, Girard College would not exist. They also demonstrate that Girard intended his institution to have a public character, and the City and Commonwealth did everything to effectuate his intention. Indeed if the physical aspects of the College contributed *solely* by Girard could somehow be separated from those to which the State contributed, of the former there would remain only 43 acres of vacant land on Ridge Avenue, Philadelphia, intersected by numerous city streets, vacant land on the square at 12th and Market Streets, Philadelphia, and some $4,500,000 in cash. If the present trustees administered no more than such a trust res, they might arguably be administering a trust whose admission policies would not be controlled by the Fourteenth Amendment.[16]

Even under such a hypothesis, however, the trustees could not eliminate another crucial action by the State without which racial discrimination would not now exist at Girard College. This, of course, is the illegal failure of the State to admit eligible Negroes between the adoption of the Fourteenth Amendment and 1959. It cannot be disputed that *but for* this failure on the part of the City to conform to the legal requirements of the Fourteenth Amendment when application was made to them by two qualified Negroes in 1954, no racial restriction would exist today at Girard College. *Sweet Briar Institute v. Button,* 12 Race Rel. L. Rep. 1188 (1967).

16. It was no doubt such a situation which Mr. Justice Douglas hypothesized when he wrote in Evans v. Newton, 382 U. S. at 300: "If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control or management of that facility, we assume *arguendo* that no constitutional difficulties would be encountered."

In recent years state involvement at Girard College has taken several further forms. First are the continuing supervisory functions which the City and State presently give the College. These are the contacts summarized by the District Court in its opinions (483a-87a, 862a-65a), including reports to the Legislature, tax exemption and supervision and inspection by the State Departments of Public Instruction and Welfare (483a-87a).[17]

Additionally, the State Courts have dealt with Girard College in a special way. When this Court determined in 1957 that there was a conflict between the City trusteeship and the Fourteenth Amendment, Girard was obviously not alive and present to indicate his personal choice between establishing a school for whites only or continuing the school under governmental trusteeship. Similarly, no other private person—heir, beneficiary or other—petitioned the Orphans' Court for a substitution of trustee pursuant to the normal rules of trust law.[18] Instead, the State Court itself *sua sponte* adopted the procedure of removing the City as trustee and of selecting, appointing and supervising other *sui generis* trustees. The Board of City Trusts did nothing to resist its ouster (638a). As Judge Kalodner correctly stated in his concurring opinion, this removal by the Orphans' Court was done solely "for the avowed purpose of carrying out the racial exclusionary clause of Girard's Will" (A66).

In the light of this background it is clear that the present trustees hold offices quite different from those of the ordinary private trustee, a person or institution specifically named in a will, or a substituted trustee approved by

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17. The District Court found as a fact that the College was subject to the supervision of the Commonwealth (483a-487a).

18. At least in *Evans v. Newton*, it was private petitioners who attempted to have the City removed as trustee.

a court pursuant to the petition of a private person who has a legal interest in the estate. The present trustees were selected and appointed solely by the Orphans' Court, just as the former trustee, the Board of City Trusts was selected and appointed by the Court of Common Pleas of Philadelphia. Six of the present trustees were members of the Board of City Trusts, a City agency, and one condition of their appointment here was that they had to resign from the Board of City Trusts (826a, 869a). The trustees' intentions were *ascertained before* the Orphans' Court entered its order removing the City and appointing them (825a, 869a). The present trustees were officially sworn in before the judges of the Orphans' Court (825a, 869a, 640a, 646a, 9b, P-54), and given a Court-impressed certificate of appointment, a seal of approval not given any other trustee (825a-26a, 869a, 647a). Contrary to the usual practice regarding trustees, from whom the Orphans' Court on its own motion never requires an accounting, in this case the Orphans' Court specifically directed the trustees to render accountings every year and, subsequently, every three years (826a, 869a). Likewise every three years each trustee must be reappointed, or a successor chosen for him by the Orphans' Court. The trustees were originally chosen and obviously their successors would be chosen, not only for their ability but according to the essential criterion that they would never decide to admit Negroes to Girard College (678a-79a). Certainly, a trustee who might privately wish to admit Negroes to the College (see *Sweet Briar Institute v. Button, supra*) would necessarily be influenced by the threat that the Orphans' Court would not reappoint him when his term expired. Finally, the special concern of the Orphans' Court for the College and the special treatment which it has given it, in contrast to that shown all other Pennsylvania trusts, is indicated by the visits of "official

inspection" paid to the College by the Judges of the Orphans' Court (644a, 645a, 862a, 3b, 4b) and the interest taken by the judges in the affairs of the College (648a-49a). For example, in April 1963, the Orphans' Court received a complaint about the President of the College (648a). The trustees were informed by Judge Bolger:

> "The Court ['at the conference of the Judges of the Orphans' Court'] has asked me to request that you give the matter contained therein the attention which you think it deserves and kindly let us have your comment" (649a, 5b).

An investigation was made by the trustees and reported to the Orphans' Court (650a, 6b).

Finally, when the substituted trustees found that certain existing State statutes interfered with their convenient administration of the trust, the legislature was induced to act (7b-8b). Act of November 19, 1959, P. L. 1526, Pa. Stat. Ann. tit. 20, §§ 1144.1-1144.9. As Judge Van Dusen, concurring below, noted: "The Act of November 19, 1959, . . . authorized *ex post facto* the Orphans' Court's actions and further implemented the changeover by fully empowering the new private trustees to serve in place of the Board of City Trusts as guardians of the boys attending Girard College and to set up a common trust fund for their property" (A71-A72).

On the basis of all these facts, the District Court held that Girard's admission policies were governed by the Fourteenth Amendment, and thus it could not exclude applicants, otherwise qualified, solely on the basis of race. The Court of Appeals for the Third Circuit, sitting *en banc*, unanimously affirmed.

REASONS FOR DENYING THE WRIT.

Petitioners have failed to advance any reason as to why the essentially factual decision of the District Court, unanimously affirmed by the Court of Appeals for the Third Circuit sitting *en banc,* merits a time-consuming review by this Court.[19] Six Federal judges who have heard this matter have held that denial of admission of Negroes to Girard College violates the Fourteenth Amendment. None has held to the contrary.

I. Petitioners Have Presented No Cognizable Ground Under This Court's Rule 19(1)(b) for Granting Certiorari.

The decision of the court below obviously was not in conflict with that of another court of appeals nor did it decide a federal question in conflict with applicable decisions of this Court.[20] Supreme Court Rule 19(1)(b). Therefore, Petitioners can only be contending that this case presents an important question of federal law which has not been, but should be, settled by this Court. Even a cursory consideration of the record in this case will show that no such question is present.

The ruling of the District Court here under review was based upon extensive fact finding as to the massive state in-

19. The Petitioners' misleading quotation from the District Court's first decision on a Motion to Dismiss the Complaint, in which the Court mentioned the "frontiers of the Fourteenth Amendment," merits little comment. The District Court's early decision on the Motion to Dismiss the Complaint did not in fact go to the merits of the federal issues, referred only to "some" of the constitutional issues involved, and was made in 1966 before this Court's decisions in *Reitman v. Mulkey,* 387 U. S. 369 or *Sweet Briar Institute v. Button,* 387 U. S. 423, and before the several lower court decisions applying the Fourteenth Amendment to identical facts. See cases cited page 16 below.

20. No decision of this Court since at least 1940 has barred the admission of Negroes to previously segregated premises.

volvement with Girard College, even apart from the role of the City as title holder, both before and after the substitution of trustees in 1959. The Petitioners did not challenge the sufficiency of the record to support this fact finding and the Court of Appeals held that the trial court had made its findings "with full justification in the record" (A57). This Court has traditionally refused to grant certiorari simply to review findings of fact confirmed by two lower Federal Courts.

If the factual finding of state involvement stands, then this case is governed *a fortiori* by this Court's ruling in *Pennsylvania v. Board of Directors,* 353 U. S. 230, that the existence of a testator's intent does not insulate an institution from the effect of the Fourteenth Amendment. *Evans v. Newton,* 382 U. S. 296; *Sweet Briar Institute v. Button,* 12 Race Rel. L. Rep. 388 (1967); *Estate of Clayton,* No. 5702, Denver, Colo., Probate Court (March 16, 1967) (not reported: Negroes admitted to school established under will modeled after Girard's); *Winsey v. Tate,* Dec. Term, No. 946, C. P. Phila. (March 17, 1967) (not reported: since Fourteenth Amendment applies to Girard College, City may spend tax funds to conduct instant litigation).

II. There Is No Merit In Any of Petitioners' Five Supposed Reasons for Granting Certiorari.

A. *Shelley v. Kraemer.* First, *Shelley v. Kraemer,* 334 U. S. 1, was an alternative ground for the decision below. Second, in so far as that decision relies on *Shelley,* it is well within the *Shelley* principle. In *Shelley* the court in question merely applied neutral principles of law in a litigation contested on both sides by private parties. Here the Orphans' Court of Philadelphia *sua sponte* and *ex parte* created a device for preventing a willing "seller" of education (the Board of City Trusts, as trustee of Girard College, which by virtue of this Court's decree had to be "willing")

from giving such education to willing "buyers" of the education (the Negro applicants). This case is ruled by *Shelley a fortiorari.* See also *Sweet Briar Institute v. Button,* 387 U. S. 423 and, *on remand,* 12 Race Rel. L. Rep. 388 (1967). Surely if it was unconstitutional for the Attorney General of Virginia to seek to prevent Sweet Briar from admitting Negro girls, as Petitioners concede, it was equally so for the Orphans' Court to prevent the City of Philadelphia (ordered by this Court in 1957 to cease discrimination) from admitting the Negro boys in the first Girard litigation.

B. *Evans v. Newton.* The undisputed facts set forth above in the Counterstatement of the Case—when contrasted with the bare record in *Evans v. Newton,* 382 U. S. 296, which came before this Court without an evidentiary hearing—demonstrate without need for further argument that this case is controlled *a fortiori* by *Evans.* It need only be noted, in connection with Petitioners' argument that a park is more "public" than a school, that all states compel school attendance but certainly do not compel the use of parks.

C. *Reitman v. Mulkey.* Petitioners contention that so-called "neutral" principles of common law were applied to Girard College by the Orphans' Court, in contrast to the constitutional enactment reviewed in *Reitman v. Mulkey,* 387 U. S. 369, is belied by the record here. As Judge Kalodner correctly pointed out in his concurring opinion below:

> "In the instant case, the Orphans' Court had two alternative courses of action following the ruling of the Supreme Court of the United States in Pennsylvania v. Board of Directors of City Trusts, 353 U. S. 230 (1957), that the Board's denial of admission to Girard College of negro male orphans pursuant to the racial

exclusionary clause of Stephen Girard's Will constituted state action in violation of the Fourteenth Amendment.

> "The Orphans' Court could have pursued the alternative of directing the Board of Directors of City Trusts to admit negro orphans to Girard College. Instead, it *sua sponte* pursued the alternative course of removing the Board and appointing individual private trustees in its stead so as to permit continuance of the discriminatory admission policy dictated by Girard's Will." (A66-67)

As Judge Kalodner noted, a *choice* of "neutral" principles was open and the choice of the one favoring segregation was therefore a non-neutral act and forbidden by the Fourteenth Amendment.

D. *Burton Revisited.* While the trustees purport to mount a legal attack on the significance of the City's historical and continuing relationship to Girard College, they do not contravene the record basis of the factual findings of the District Court, affirmed by the Court of Appeals *en banc.* This Court, reading the Counterstatement of the Case above, will have no difficulty seeing that the state contacts here are enormously greater than analogous contacts in such recent cases as *Burton v. Wilmington Parking Authority,* 365 U. S. 715, *Peterson v. City of Greenville,* 373 U. S. 244, *Lombard v. Louisiana,* 373 U. S. 267, *Robinson v. Florida,* 378 U. S. 153 and *Mason v. City of Biloxi,* 385 U. S. 370, *reversing per curiam* 184 So. 2d 113 (Miss. 1966).

The history recited in the Counterstatement of the Case shows an example of the State making possible in 1968 the practice of racial discrimination at an educational

institution open to a significant part of the American community ("*any* needy fatherless boy—as long as he is 'white'" (488a, 867-68a)). This century and one-third of affirmative State action, including actual construction of the facilities, far exceeds the half century of merely custodial care by the City of Macon, Georgia, using funds of the testator to maintain park grounds in *Evans*. It far exceeds the purely "moral" support given private golf courses and swimming pools to which the state retains only the right of a reverter. *E.g., Hampton v. Jacksonville,* 304 F. 2d 320 (5th Cir. 1962). It far exceeds the recent support given wholly private hospitals which have accepted some supplementary State monies. *E.g., Eaton v. Grubbs,* 329 F. 2d 710 (4th Cir. 1964). It is incomparably greater than the possible effect of an ordinance requiring separate but equal washrooms for restaurant *employees* upon a segregationist restaurant owner's refusal to serve Negro *customers*. *Robinson v. Florida, supra.* In all these cases the institutions and the private racial prejudice would still exist, even if the State involvement were not present. Not so with Girard College, where, but for the actions of the State there would be no institution in 1968 and no racial discrimination in 1968.

E. *The Effect of This Court's Earlier Mandate.* Petitioners' attempt to argue that this Court's 1958 denial of certiorari to review the actions of the Philadelphia Orphans' Court in substituting "private" trustees in order to prevent admission of Negroes, constituted a substantive ruling approving that action. One of the clearest precedents in this Court is that denial of certiorari indicates no ruling on the merits. *E.g. United States v. Carver,* 260 U. S. 482, 490; *Polites v. United States,* 364 U. S. 426, 433 n. 9. This rule has been applied equally when a remand is involved. *E.g. United States v. Schubert,* 348 U. S. 222, 228-29. Since this

Court does not grant certiorari and decide major constitutional questions (as in the *Board of Directors* case *supra*) for the purpose of instructing state courts on the proper common law device by which to perpetuate segregation, the earlier denial of certiorari obviously reflected one of the following factors:

1. Much of the history set forth in the Counterstatement of the Case here was not before the Orphans' Court or this Court in the earlier litigation.

2. No application was made by the Negro plaintiffs in the earlier litigation to the "substituted" trustees, and consequently there had been no refusal of admission of Negroes by those trustees. Thus, the federal question may not have been properly presented. See Justice Black's Opinion in *Evans v. Newton,* 382 U. S. 296; compare *Naim v. Naim,* 350 U. S. 891, with *Naim v. Naim,* 197 Va. 734, 90 S. E. 2d 849 (1956), and *Naim v. Naim,* 350 U. S. 985; and see *Loving v. Virginia,* 388 U. S. 1.

In addition:

3. The Supreme Court of Georgia in *Evans v. Newton,* 220 Ga. 280, 138 S. E. 2d 573 (1965), expressly held, as the Petitioners now contend, that the denial of certiorari in the second *Board of Directors* case was a holding that this Court had approved substitution of Trustees as a device for maintaining segregation. This Court of course reversed. *Evans v. Newton,* 382 U. S. 296.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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